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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945.

No. 138 · 22

MAX LEVINSON,

Petitioner,

vs.

SPECTOR MOTOR SERVICE, A CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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IN THE

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MAX LEVINSON,

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SPECTOR MOTOR SERVICE, A CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

OPINION BELOW.

The opinion below is reported in 389 Illinois Supreme Court Reports at page 466 (advance sheets, 389 Ill. No. 6).

STATEMENT MAKING AGAINST JURISDICTION.

Petitioner has not appended to his petition a copy of the opinion of the Supreme Court of Illinois, as required by rule 12, paragraph 1 of this Court.

The case at bar was decided by both the Appellate Court (Petn. 19-23) and the Supreme Court (Rec. 63) of Illinois

solely on the ground that, *as a matter of fact, petitioner's duties substantially affected the safety of operation* of respondent's motor vehicles, engaged in interstate commerce and that consequently, as a matter of law, petitioner was exempted from the provisions of Section 7 of Fair Labor Standards Act, pursuant to the provisions of Section 13 (b) (1) of said Act.

This case does not involve the interpretation of either the Fair Labor Standards Act or the Motor Carrier Act of 1935. Petitioner has cited no case in which this Court took jurisdiction under circumstances similar to those in the case at bar.

If petitioner desired to contend that, for any reason, he was deprived of due process of law, he should have raised the point in Supreme Court of Illinois, which he failed to do.

No substantial or important question of law is presented by this record.

The entire issue below was one of fact.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner's "Summary Statement of Matters Involved" is incorrect and incomplete.

The petitioner filed, in the Municipal Court of Chicago, a suit against the respondent for overtime wages alleged to be due under the provisions of the Fair Labor Standards Act. The respondent's defense was that petitioner was employed as a dockman, loader and foreman and that his duties affected the safety of operation of respondent's vehicles operated by it as a common carrier of freight in interstate commerce by motor vehicle (R. 9); that the matter of regulation of petitioner's wages and hours, therefore, came under the exclusive jurisdiction of the Interstate Commerce Commission. The trial court held that the petitioner's duties did not substantially affect safety of operation. On appeal by the respondent to the Appellate Court of Illinois, the Appellate Court reversed the trial court and held that the petitioner's duties substantially affected the safety of operations. (Petn. 23.) The judgment of the Appellate Court was affirmed by the Supreme Court of Illinois. (R. 64.)

The statement, at page 3 of his petition, that the Appellate Court of Illinois reversed the judgment of the trial court "on the theory that, as a matter of law, if petitioner 'performed any' work affecting safety of operations it is sufficient to deprive him of coverage under Fair Labor Standards Act," is a deliberate distortion of the language of the Appellate Court and is grossly misleading. What the Appellate Court did say was:

> "* * * we believe that the true determinant is whether an *employee performs* any duties which *sub-*

stantially affect the safety of operation . . . (Emphasis supplied.)

. . . We believe that his duties and not the name given to his position are determinative." (Petn. 23.)

The Supreme Court of Illinois, affirming the decision of the Appellate Court, said:

"The Appellate Court found that the loaders in Appellant's gang were exempted from Section 7 of the Fair Labor Standards Act and that appellant therefore came within the exemption because he planned and directed the loading affecting the safety of operation.

The substantial effect of the comment of the Appellate Court was to effect that the quantity of plaintiff's activity was not the true test of exemption from the Fair Labor Standards Act, yet said court did hold the appellant was in the same position as the loaders.

The Appellate Court may be in error in the reasons given for its judgment, but, *under the facts as found by the court,* the employee came within the same exemption as loaders, dockmen and helpers.

For the reason aforesaid, the judgment of the Appellate Court is affirmed." (Rec. 64.) (Emphasis supplied.)

THE QUESTION PRESENTED.

The only question involved is basically one of fact, viz.: did the services rendered by the petitioner *substantially affect the safety of operation* of the respondent's motor vehicles used by it as a common carrier of freight in Interstate Commerce?

ARGUMENT.

I.

(a) The Interstate Commerce Commission Has Exclusive Power to Establish Qualifications and Maximum Hours of Service Pursuant to the Provisions of Section 204 of the Motor Carrier Act of 1935.

(b) The Appellate Court of Illinois Rightly Held and the Supreme Court of Illinois Rightly Affirmed That the Petitioner is Included Within the Class of Employees Who Are Specifically Exempted From the Operation of the Fair Labor Standards Act of 1938, But Are Under the jurisdiction of the Interstate Commerce Commission.

The petitioner based his suit on the provisions of Section 7 of the Fair Labor Standards Act of 1938.

Section 13 of said Act, however, provides that employees with reference to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service shall be exempted from the provisions thereof.

U. S. Code Ann. Title 49, Section 304: defining the power and duties of the Interstate Commerce Commission, reads:

> "(a) *Powers* and duties generally. It shall be the duty of the Commission—
>
> (1) To regulate common carriers by motor vehicle * * * may establish reasonable requirements with respect to * * * qualifications and *maximum hours of service of employees, and safety of operation and equipment.*" (Emphasis supplied.)

That this power, whether exercised or not, has existed

in the Interstate Commerce Commission since the enactment of the Motor Carrier Act of 1935 is now firmly established. *Southland Company* v. *Bailey*, 319 U. S. 44.

This Court, interpreting and delimiting the respective provisions of the Motor Carrier Act of 1935 and of the Fair Labor Standards Act of 1938, in *U. S.* v. *American Trucking Associations*, 310 U. S. 534 at page 553 said:

> "Our conclusion, in view of the circumstances set out in this opinion, is the meaning of employees in Section 204 (a) (1) and (2) is limited to those employees *whose activities affect the safety of operation.*" (Emphasis supplied.)

Shortly after the last quoted decision of this Court, the Interstate Commerce Commission held lengthy hearings, and rendered an opinion and report, *Ex Parte No. M C 2*, 28 Motor Carrier Cases, 125 (Interstate Commerce Commission Reports).

In said report the Commission, with particular reference to loaders, said at page 133:

> "The large carriers, however, and particularly those who have important operations from terminal to terminal, employ *men variously called loaders, dockmen or helpers, and hereinafter called loaders*, whose sole duties are to *load and unload* motor vehicles and transfer freight between motor vehicles and between the vehicles and the warehouse.
>
> The evidence makes it entirely clear that *a motor vehicle must be properly loaded to be safely operated on the highways of the country.*" (Emphasis supplied.)

The Commission further in this report, under the heading of "Findings of Facts", said at page 139:

> "2. That *loaders, as above defined*, employed by common and contract carriers and private carriers of property by motor vehicle subject to part II of the Interstate Commerce Act *devote a large part of their*

time to activities which directly affect the safety of operation of motor vehicles in interstate or foreign commerce." (Emphasis supplied.)

The Commission further in this report, under the heading of "Conclusions of Law," said at page 139:

"2. That *our jurisdiction* to prescribe qualifications and maximum hours of service for employees of common and contract carriers and private carriers of property by motor vehicle *is limited to those employees who devote a substantial part of their time to activities which directly affect the safety of operation* of motor vehicles in the transportation of passengers or property in interstate or foreign commerce.

3. That *we have power*, under section 204 (a) of said part II, *to establish* qualifications and *maximum hours of service* for the classes of employees covered by findings of fact numbered 1, 2 and 3 above, and that we have no such power over any other classes of employees, except drivers." (Emphasis supplied.)

It has been unanimously held by District Courts that employees whose duties substantially affect the safety of operations come exclusively under the jurisdiction of the Interstate Commerce Commission and are excluded from the provisions of the Fair Labor Standards Act of 1938.

In *Crean* v. *Moran Transportation Co.*, 57 Fed. Supp. 212, it was held that:

"By substantial is not meant a majority of the time." Citing *Ex Parte* No. M. C. 2, 28 M. C. C. 125 and *Kasofsky* v. *Champion Trucking Co., Inc.*, 181 Misc. 470, 473.

See also:

Tinerella, et al. v. *Des Moines Transp. Co., Inc.*, 41 Fed. Supp. 798.

Robbins v. *Zabarsky, et al.*, 44 Fed. Supp. 867.

Bechtel v. *Stillwater Milling Co.*, 33 Fed. Supp. 1010.

West v. *Smoky Mountains Stages, Inc.*, 40 Fed. Supp. 296.

Magann v. *Long's Baggage Transfer Co., Inc.*, 39 Fed. Supp. 742.

Faulkner v. *Little Rock Furniture Mfg. Co.*, 32 Fed. Supp. 590.

Whether or not the duties performed by the petitioner substantially affected safety of operations is purely a question of fact.

The Appellate Court, reviewing the evidence presented at the trial of the case, and the findings of the trial court came to the conclusion that the services rendered by petitioner substantially affected the safety of operation of respondent's motor vehicles; that he was, accordingly, exempt from the provisions of section 7 of the Fair Labor Standards Act, but that control of his qualifications and maximum hours of service was exclusively within the jurisdiction of the Interstate Commerce Commission.

The Appellate Court said:

> "There is no question that some part of plaintiff's work week was devoted to the direction and supervision of the loading of interstate motor freight carriers. There is no question either that the loaders in his gang were exempted from Section 7 of the Fair Labor Standards Act. *We think, therefore, that with greater force, plaintiff comes within the exemption for, if the loaders are exempt because the manner in which they work affects the safety of the operation of defendant's motor vehicles, certainly the duties of plaintiff, who planned and directed the loading, affect that safety.* Considering the purpose of the Motor Carriers Act, we believe that the true determinant is whether an employee performs any duties which substantially affect the safety of operation, rather than whether the duties affecting safety are substantial." (Petn. 23.) (Emphasis supplied.)

The Supreme Court of Illinois in affirming the judgment of the Appellate Court in this case, said:

> "* * * under the *facts* as found by the court, the employee came within the same exemption as loaders, dockmen and helpers.
>
> *For the reason aforesaid*, the judgment of the Appellate Court is affirmed." (R. 64.) (Emphasis supplied.)

In view of the specific finding by this court in *U. S. v. American Trucking Ass'n*, 310 U. S. 534 and of the *Interstate Commerce Commission in Ex Parte No. M. C. 2*, 28 Motor Carrier Cases 125, that the Interstate Commerce Commission has exclusive jurisdiction to determine maximum hours of loaders, the statement of petitioner at page 6 of his petition that "The Appellate Court was without authority in holding that the loaders of plaintiff's gang were exempt from section 7 and that, therefore, with greater force he came within the exemption" is untenable and entirely inconsistent with the law as established.

II.

Under the Statutes of Illinois, the Appellate Court has Power and Authority to Make a Final Determination of a Case Different from that of the Trial Court, where a Trial was had without a Jury. Findings of Fact by the Appellate Court may not, Under the Illinois Practice, be Reviewed by the Illinois Supreme Court in a Case at Law.

Chap. 110 Sec. 213 Smith-Hurd Illinois Statutes (Sec. 89 Civil Practice Act) provides:

> "If any final determination of any cause or proceeding tried without a jury, except as to equitable issues, shall be made by the Appellate Court, as the result wholly or in part of the finding of the facts, concerning the matter in controversy, different from the

finding of the court from which such cause or proceeding was brought by appeal, it shall be the duty of such Appellate Court to indicate in its opinion or in its final order, judgment or decree, the facts as found; and the statement of such facts by the Appellate Court shall be final and conclusive as to all matters of fact in controversy in such cause or proceeding. If the facts found by the Appellate Court sufficiently appear in the opinion or in the final order, judgment or decree, or from an examination of the two, no such final order, judgment or decree shall be reversed for failure to recite such facts. (1933, June 23, Laws 1933, p. 784, art. 8, Sec. 89.)"

Chap. 110, Sec. 216, Smith-Hurd Illinois Statutes (Sec. 92 (3) (b) of Illinois Civil Practice Act) reads as follows:

"Error of fact, in that the judgment, decree or order appealed from is not sustained by the evidence or is against the weight of the evidence, may be brought up for review in any civil case: Provided, that, except as to equitable issues, the Supreme Court shall reexamine cases brought to it by appeal from the Appellate Courts, as to questions of law only."

In *Hadley* v. *Union Trust & Savings Bank*, 308 Ill. 175, at page 181, the Supreme Court of Illinois stated:

"The finding of the Appellate Court of a question of ultimate fact derived from a consideration of evidentiary facts, though requiring the application of principles of law to the consideration of the evidence, is a finding upon a mixed question of law and fact, which is final. (*Navratel* v *Curtis Door and Sash Co.*, 290 Ill. 526.) *We are prohibited by law from allowing any assignments of error calling in question the determination of such a question of fact by the Appellate Court.*" (Emphasis supplied.)

See also:

Ebbert v. *Metropolitan Life Insurance Co.*, 369 Ill. 306 at p. 310.

Shannon v. Nightingale, 321 Ill. 168.
McGoorney v. *Melrose Park*, 241 Ill. 142.
Roemheld v. *City of Chicago*, 231 Ill. 467.

The Supreme Court of Illinois has held that it is not concerned with the reasons assigned by the Appellate Court for its judgment.

In the recent case of *Merlo* v. *Public Service Co.*, 381 Ill. 300, at 321, it succinctly announced the limits of its inquiry as follows:

> "The inquiry of this court in cases appealed from the Appellate Court can only be whether there was error committed in rendering the judgment complained of. In actions at law this inquiry is confined to errors of law. While this court will examine the opinion of the Appellate Court to determine whether that court predicated its judgments solely on an erroneous conception of law, *what that court may assign as reasons for its judgment is not a matter of concern here.* Our duty is to determine the correctness of the judgment reviewed." (Emphasis supplied.)

The fact that a certificate of importance was granted does not have the effect of enlarging the scope of the inquiry which that Court is permitted to make. In *Stevenson* v. *Earling*, 290 Ill. 565, where the case was tried without a jury, the Appellate Court reversed, and granted a certificate of importance. In its opinion, at page 568, the Supreme Court of Illinois, said:

> "The finding of an ultimate fact is a conclusion of fact drawn from evidentiary facts, and the application of legal principles may be required to reach such conclusion, thereby making the question a mixed one of law and fact. Findings by the Appellate Court on mixed questions of law and fact are binding on this court." (Citing cases.)

III.

No Question of Due Process of Law Is Involved.

Petitioner concludes his summary statement with the comment: "Thus the petitioner was deprived of the judgment without due process law," etc. (Petn. 4.)

The grounds for such assertion are not stated.

All judgments of *nisi prius* courts are subject to appeal.

Respondent, within its rights, appealed from the judgment of the Municipal Court, which was thereupon reversed by the Appellate Court. The petitioner, within his rights, thereupon appealed from the judgment of the Appellate Court to the Supreme Court of Illinois which Court affirmed the judgment of the Appellate Court. All of this was done in accordance with the statutes, laws, and established practice of the State of Illinois.

Nowhere in the proceedings below did the petitioner raise the question of due process of law.

Such question, therefore, may not be raised here for the first time.

Hulbert v. *Chicago*, 202 U. S. 275.

Pennsylvania Railroad Co. v. *Ill. Brick Co.*, 297 U. S. 447, 462, 463.

IV.

No Important Question of Law Is Here Involved.

The entire matter involved herein is one of fact.

This court has repeatedly announced that "the application of the Act depends upon the character of the employee's activities."

Overstreet v. *North Shore Corporation*, 318 U. S. 125, 132.

Kirschbaum v. *Walling*, 316 U. S. 517.

This Court does not grant a certiorari to review evidence and discuss specific facts.

United States v. *Johnston*, 268 U. S. 220, 227.

Texas & New Orleans Railroad Co. v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 558.

Washington Securities Co. v. *United States*, 234 U. S. 76, 78.

Conclusion.

For the foregoing reasons it is respectfully submitted that this is not a proper case for review by certiorari, and that the petition for such writ should be denied.

Respectfully submitted,

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